Supreme Court, U.S.
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No. 00-349

In The

Supreme Court of the United States

CRAIG SCOTT DOUGALL, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS OF GEORGE MASON UNIVERSITY

and

THE COMMONWEALTH OF VIRGINIA,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Must the Commonwealth of Virginia, which has not waived immunity from Fair Labor Standards Act suits by state workers, provide state workers with a further remedy than the Virginia Personnel Act?

2. Does the right to receive pay for disputed hours claimed to be overtime hours constitute a "property right" protected from deprivation by the Fourteenth Amendment?

3. As Virginia has waived sovereign immunity for certain contract actions against the Commonwealth, must she also waive immunity for claims upon employment contracts for overtime pay by employees covered by the Virginia Personnel Act?

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STATEMENT OF JURISDICTION

The Petitioners ("Police Officers" or "Officers") did not present an issue of federal law or Constitutional due process before the trial court or the state's appellate court. There was not an allegation of constitutional deprivation in the lawsuit filed. The Petitioners' "Questions Presented" to the Va. Supreme Court were precisely: "1. Is the Commonwealth immune as to contract claims relating to contract rights created by express agreements, course of dealing, and statute? 2. Is the Commonwealth's employee grievance procedures the exclusive procedure for contract claims concerning wages?" Neither the trial judge nor the Virginia Supreme Court issued a written opinion on the substance of the issues that the Officers seek to raise. For these reasons, jurisdiction is lacking.

STATUTORY PROVISIONS

TITLE 2.1. ADMINISTRATION OF THE GOVERNMENT GENERALLY CHAPTER 10.01. THE DEPARTMENT OF EMPLOYEE RELATIONS COUNSELORS

Va. Code Ann. § 2.1-116.05

(1998)

§ 2.1-116.05. Grievance procedure generally

A. It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees must be able to freely, and without retaliation, discuss their

concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.1-116.09.

B. As part of the Commonwealth's program of employee relations management, the Department shall develop a grievance procedure that includes not more than three successively higher grievance resolution steps and a formal hearing as provided in this chapter.

C. Prior to initiating a written grievance, the employee shall be encouraged to pursue an informal complaint with his immediate supervisor. The supervisor shall have authority to resolve the complaint if it involves actions within his control.

D. An employee may pursue a formal written grievance through the grievance resolution steps if the complaint has been presented to management within thirty calendar days of the employee's knowledge of the event that gave rise to the complaint. Employees' rights to pursue grievances shall not be used to harass or otherwise impede the efficient operations of government.

E. Upon receipt of a timely written complaint, management shall review the grievance and respond to the merits thereof. Each level of management review shall have the authority to provide the employee with a remedy. At least one face-to-face meeting between the employee and management shall be required. The persons who may be present at this meeting are the

employee, the appropriate manager, an individual selected by the employee, and an individual selected by the manager. Witnesses may be called by either party.

F. Pursuant to § 2.1-342 B 3 of the Virginia Freedom of Information Act and § 2.1-382 of the Virginia Privacy Protection Act of 1976, all information relating to the actions grieved shall be made available to the employee by the agency, except as otherwise provided by law. Information pertaining to other employees that is relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the complaint or dispute.

G. All time limitations prescribed in the grievance procedure, including, but not limited to, submission of an initial complaint and employee appeal of management decisions, shall be reasonable, specific, and equally applicable to the agency and the employee. Expedited grievance procedures shall be established for terminations, demotions, suspensions, and lost wages or salaries.

H. Within five workdays of the receipt of a written notice of noncompliance, failure of the employee or the agency to comply with a substantial procedural requirement of the grievance procedure without just cause may result in a decision against the noncomplying party on any qualified issue. Written notice of noncompliance by the agency must be made to the agency head. The Director shall render all decisions related to procedural compliance, and such decisions shall be final.

I. Grievances qualified pursuant to § 2.1-116.06 that have not been resolved through the grievance resolution

steps shall advance to a hearing which shall be the final step in the grievance procedure.

Va. Code Ann. § 2.1-116.06

(1998)

§ 2.1-116.06. Grievances qualifying for a grievance hearing; grievance hearing generally

A. A grievance qualifying for a hearing shall involve a complaint or dispute by an employee relating to the following adverse employment actions in which the employee is personally involved, including but not limited to: (i) formal disciplinary actions, including suspensions, demotions, transfers and assignments, and dismissals resulting from formal discipline or unsatisfactory job performance; (ii) the application of all written personnel policies, procedures, rules and regulations where it can be shown that policy was misapplied or unfairly applied; (iii) discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin or sex; (iv) arbitrary or capricious performance evaluations; (v) acts of retaliation as the result of the use of or participation in the grievance procedure or because the employee has complied with any law of the United States or of the Commonwealth, has reported any violation of such law to a governmental authority, has sought any change in law before the Congress of the United States or the General Assembly, or has reported an incidence of fraud, abuse, or gross mismanagement; and (vi) retaliation for exercising any right otherwise protected by law.

B. Management reserves the exclusive right to manage the affairs and operations of state government. Management shall exercise its powers with the highest degree of trust. In any employment matter that management precludes from proceeding to a grievance hearing, management's response, including any appropriate remedial actions, shall be prompt, complete, and fair.

C. Complaints relating solely to the following issues shall not proceed to a hearing: (i) establishment and revision of wages, salaries, position classifications, or general benefits; (ii) work activity accepted by the employee as a condition of employment or which may reasonably be expected to be a part of the job content; (iii) contents of ordinances, statutes or established personnel policies, procedures, and rules and regulations; (iv) methods, means, and personnel by which work activities are to be carried on; (v) termination, layoff, demotion, or suspension from duties because of lack of work, reduction in work force, or job abolition; (vi) hiring, promotion, transfer, assignment, and retention of employees within the agency; and (vii) relief of employees from duties of the agency in emergencies.

D. Decisions regarding whether a grievance qualifies for a hearing shall be made in writing by the agency head or his designee within five workdays of the employee's request for a hearing. A copy of the decision shall be sent to the employee. The employee may appeal the denial of a hearing by the agency head to the Director. Upon receipt of an appeal, the agency shall transmit the entire grievance record to the Department within five workdays. The Director shall render a decision on

whether the employee is entitled to a hearing upon the grievance record and other probative evidence.

E. Proceedings for review of the decision of the Director may be made by an employee filing a notice of appeal within five workdays of receipt of the decision. Within five workdays thereafter, the agency shall transmit to the clerk of the circuit court in the jurisdiction in which the grievance arose a copy of the grievance record. The court, on motion of the grievant, may issue a writ of certiorari requiring the Director to transmit the record on or before a certain date. Within thirty days of receipt of such records, the court, sitting without a jury, shall hear the appeal on the record and such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. The court, in its discretion, may receive such other evidence as the ends of justice require. The court may affirm the decision of the Director or may reverse or modify the decision. The decision of the court shall be rendered no later than the fifteenth day from the date of the conclusion of the hearing. The decision of the court is final and is not appealable. The circuit court hearing shall be at no cost to the Commonwealth or the grievant.

F. The hearing pursuant to § 2.1-116.07 shall be held in the locality in which the employee is employed or in any other locality agreed to by the employee, employer, and hearing officer. The employee and the agency may be represented by legal counsel or a lay advocate, the provisions of § 54.1-3904 notwithstanding. The employee and the agency may call witnesses to present testimony and be cross-examined.

Va. Code Ann. § 2.1-116.07

(1998)

§ 2.1-116.07. Hearing officers; duties; decisions; costs

A. The Director shall assign a hearing officer to conduct the grievance hearing. All hearing officers shall be selected, on a rotating basis, from the list of administrative hearing officers maintained by the Supreme Court of Virginia pursuant to § 9-6.14:14.1. In addition to the training requirements imposed by the Supreme Court, each hearing officer shall attend annually at least one day of training in employment law or state personnel policies and organizations. Such training shall be conducted by the Department or an organization approved by the Virginia State Bar for continuing legal education.

B. Hearing officers shall have the following powers and duties:

1. Hold conferences for the settlement or simplification of issues;

2. Dispose of procedural requests;

3. Issue orders requiring testimony or the production of evidence;

4. Administer oaths and affirmations;

5. Receive probative evidence; exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttals, or cross-examinations; rule upon offers of proof; and oversee an accurate verbatim recording of the evidence;

6. For those issues qualified for a hearing, order appropriate remedies. Relief may include reinstatement,

back pay, full reinstatement of fringe benefits and seniority rights, or any combination of these remedies; and

7. Take other actions as necessary or specified in the grievance procedure.

C. The decision of the hearing officer shall (i) be in writing, (ii) contain findings of fact as to the material issues in the case and the basis for those findings, and (iii) be final and binding if consistent with law and policy. In grievances initiated by state employees, the Director of the Department of Personnel and Training shall determine whether the decision is consistent with policy. The hearing officer's decision is effective from the date issued and shall be implemented immediately unless circumstances beyond the control of the agency delay such implementation.

D. Either party may petition the circuit court having jurisdiction in the locality in which the employee is employed for an order requiring implementation of the hearing officer's decision. The court may award attorneys' fees to either party if such party substantially prevails on the merits of the case and the opposing party's position is not substantially justified, unless special circumstances would make an award unjust.

E. Except for the employee's counsel or advocate fees, the agency from which the grievance arises shall bear the costs for the hearing officer and other associated hearing expenses.

TITLE 8.01 CIVIL REMEDIES AND PROCEDURE
CHAPTER 3 ACTIONS, §§ 25 - 227.3 ART. 18
RECOVERY OF CLAIMS AGAINST THE
COMMONWEALTH OF VIRGINIA

§ 8.01-192. How claims to be prosecuted.

When the Comptroller or other authorized person shall disallow, either in whole or in part, any such claim against the Commonwealth as is provided for by §§ 2.1-223.1, 2.1-223.3 or 8.01-605 at which time a right of action under this section shall be deemed to accrue, the person presenting such claim may petition an appropriate circuit court for redress. (Code 1950, § 8-752; 1966, c. 452; 1977, c. 617.Virginia Code § 8.01-192)

§ 8.01-193. Defense and hearing.

In every such case, the Comptroller shall be a defendant. He shall file an answer stating the objections to the claim. The cause shall be heard upon the petition, answer, and the evidence. (Code 1950, § 8-753; 1977, c. 617.)

REASONS FOR DENYING WRIT

The Police Officers of the George Mason University ("the University"), all salaried, classified state employees covered by Virginia's grievance procedure, sued the University to collect additional pay above and beyond their salaries. Each sought to employ the Fair Labor Standards Act in a private lawsuit not constitutionally permitted against a non-consenting state.

The Petitioners are simply wrong about whether Virginia is a consenting state. The University is an agency of

the Commonwealth and enjoys the same immunity. Amended Motion for Judgment at 2 (Appended hereto). The matter of Virginia's preservation of sovereign immunity in FLSA claims was settled with the Va. Supreme Court's decision in *Commonwealth v. Luzik*, 259 Va. 198, 524 S.E.2d 871 (2000) which directly addressed the issue. Petitioners are making an argument about Virginia's amenability to suits for breach of contract, which as a general proposition cannot be disputed. Where a contract with the state has been formed, the contractor may benefit from the State's waiver of immunity. But to do so, one must follow the statutory procedural requirements. Additionally, the contract must be enforceable and not precluded by the existence of a statutory recourse.

Petitioners did not preserve contractual claims, as they failed, despite the grant of leave to amend, to add the Comptroller of Virginia as defendant as is mandated by Va. Code § 8.01-193. This is a matter of settled Virginia law. The Virginia Court ruled in *Ruby C. Harris v. Prince B. Woodard, Lewis M. Walker, and The Rector and Visitors of Mary Washington College*[1], that where "from the face of the pleadings the appellant did not proceed in accordance with applicable Code provisions for relief against the Commonwealth, *See* §§ 2.1-223.1, *et seq.* and Code § 8.01-193, . . . there exists a fatal jurisdictional defect[ ]."[2] The statute is very strict: "the Comptroller shall be a defendant." Such represents an abrogation of sovereign immunity to be narrowly construed. *See also Commonwealth v. Holland*, 211 Va. 530, 178 S.E.2d 506 (1971);

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[1] Record No. 810363, September 9, 1983.

[2] The parties on appeal had not even briefed the issue.

Medicenter of America, Inc. v. Commonwealth of Virginia, 373 F. Supp. 305 (E.D. Va. 1974); *Mendenhall v. Douglas L. Cooper, Inc.*, 239 Va. 71, 74, 387 S.E.2d 468, 470 (1990) (the trial court is without jurisdiction and powerless to proceed "unless all necessary parties are properly before the court.").

The Officers ignore that a "property interest" as the Fourteenth Amendment protects must be an established interest defined by existing rules of state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Detweiler v. Commonwealth of Virginia Dept. of Rehabilitative Services*, 705 F.2d 557, 558 (4th Cir. 1983). On the theory that such hours are "hours of work", they claim pay for time spent writing police reports at home, for time spent for weapon or uniform maintenance, for travel between campuses, and other periods. However important these tasks may be, the complaint does not concern a "property interest" but rather a "unilateral expectation". *Compare Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (Prejudgment garnishment of wages is taking of property without due process) *with Biser v. Town of Bel Air*, 991 F.2d 100 (4th Cir. 1993) (No property interest in a "special exemption" before it is granted by the Board, given the local agency's significant discretion to determine whether to so issue.) The University is not failing to pay the Officers' usual expected salary. The University has a policy and the policy does not call for such hours to be compensated. See Amended Motion for Judgment, paragraphs 4-11. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it." *Roth, supra* at 577.

The "property interest in continued public employment" is recognized. *Garraghty v. Commonwealth of Va. Dept. of Corrections*, 52 F.3d 1274, 1282 (4th Cir. 1995). But in the event of a "downsizing" in State employment, that interest surrenders to the needs of the democratic process of government and the individual's position may be abolished. *Mandel v. Allen*, 81 F.3d 478 (4th Cir. 1996).

The Virginia Supreme Court has answered the question of whether state workers must be afforded access to the courts to address FLSA wage and hour complaints. The issue is "not one of the avoidance of a just contract debt, but of the preservation of a right reserved to the states by the United States Constitution." *Commonwealth v. Luzik*, 259 Va. 198, 208, 524 S.E.2d 871 (2000). Moreover, the Court rejected the

> novel theory [that] rests on the faulty premise that the complainants' entitlement to an award of damages as prescribed by the FLSA for the Commonwealth's alleged failure to comply with the Act's overtime provisions accrues independent of the complainants' ability to maintain and prevail in an action for those damages.

Id. Earlier, the Court had found no constitutional issue to be involved: "The federal constitution 'must not be trivialized by being dragged into every personnel dispute in state and local government. Disputes over overtime . . . do not implicate the great objects of the Fourteenth Amendment.' " *Buchanan v. City of Chesapeake*, 237 Va. 50, 53, 375 S.E.2d 736 (1989), *quoting from Brown v. Brienen*, 722 F.2d 360, 365 (7th Cir. 1983).

The Officers submit that the Commonwealth has not always asserted sovereign immunity and has permitted

suits for breach of contract *and therefore, no immunity lies as to actions which sound in contract.* This reasoning is precisely what the Virginia Supreme Court spurned earlier this year. See *Luzik*, 259 Va. at 207. (Rejecting the proposition that the waiver in Va. Code § 8.01-192 "should be broadly construed to act as a general waiver whenever the remedy sought might be characterized as a claim for a debt owed under a contractual relationship regardless of the nature of the proceeding in which the claim is brought or the theory advanced to assert that claim.") See *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (the Court "will find waiver only where stated 'by the most express language or by overwhelming implications from the text as [will] leave no room for any other reasonable construction.' ") (Internal citation omitted.)

The trial Judge recognized the exclusivity of the Personnel Act as a remedy for classified state workers. "The plea is overruled because the Commonwealth is not immune from suit in contract, but to the extent that the Virginia Personnel Act is the exclusive remedy, the plea is sustained because I conclude that the plaintiff simply does not have a contract action in this case." Appendix to Petition at 66a. The Officers did not exhaust the remedy of the Personnel Act; they gave up without completing the grievance form.

It should also be recognized that the Officers have not been deprived of the FLSA remedy in the form of a lawsuit by the federal government on their behalf. *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 2269 (1999).

In summary, the Police Officers have an unresolved expectation that they might be owed more pay. They were

not permitted to sue for money damages for violation of the federal FLSA because of Virginia's immunity from such actions. They never did meet all of the statutory preconditions to maintaining a suit against the Commonwealth for breach of contract, as they failed to name the proper Defendant. They were unwilling to test the words of discouragement they attribute to a single University official and actually assert the claim that the University had violated state policy in the state grievance process – a process which provides for judicial review on matters of grievability. See Va. Code § 2.1-116.06 (providing for grievance of "the application of all written personnel policies, procedures, rules and regulations where it can be shown that policy was misapplied or unfairly applied."). And under state law, the Personnel Act is an exclusive and preclusive remedy.[3]

The Virginia Attorney General represented to the trial court last December that the question of grievability of FLSA matters was unresolved. Appendix to Petition at 22a. A question unexplored, rather than a remedy denied. In the ensuing months the Attorney General has urged the Dept. of Employee Relations Counselors (now the Dept. of Employee Dispute Resolution) to certify FLSA policy compliance issues raised by state workers as grievable, because they are controversies not "solely" about wages. State policy (including an Executive Order dated September 3, 1999) and practice will include the remedy

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[3] The excerpted statutes contain the 1998 text without the 1999 and 2000 Amendments. Those Amendments expanded the procedural avenue of redress for state workers.

of back pay available under the statute. There is absolutely no reason for this Court to review the question of Virginia's affording state workers constitutional "due process" under the facts in this case.

The Petitioner's argument that "the Virginia Personnel Act only provides Petitioners a complaint to supervisors but explicitly bars any hearing on Petitioner's unpaid wage claims" (Petition at 7) is either uninformed or false. The question of whether a matter may be grieved or not is open to judicial review. Va. Code § 2.1-116.06 D and E. And the substance of a grievance is submitted for a full hearing upon all evidence in front of an administrative hearing officer. Va. Code § 2.1-116.07.

CONCLUSION

Because the Officers present a complaint that depends upon an interpretation of state law, and not federal constitutional law, the jurisdictional basis for this Petition is lacking. Because the procedural posture of the Officer's claim has been compromised by the failure to join a needed defendant, the case is a poor one for this Court to select to hear. Because no "property interest" is involved, this claim of deprivation is wholly without merit.

Respectfully submitted,

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APPENDIX

IN VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

CRAIG SCOTT DOUGALL, and other current police officers similarly situated,	)	
Plaintiffs,	)	
v.	)	
THE RECTOR AND VISITORS OF GEORGE MASON UNIVERSITY,	)	**At Law No. 178905**
and	)	
THE COMMONWEALTH OF VIRGINIA	)	
Defendants.	)	

AMENDED MOTION FOR JUDGMENT

(Filed Sep. 16, 1999)

COMES NOW Plaintiff Craig Scott Dougall, on behalf of himself and other police officers similarly situated, in and for his Amended Motion for Judgment for declaratory relief, and damages, against George Mason University, and states:

1. Plaintiff is a current employee of George Mason University. He is a police officer. Those similarly situated are current employees of George Mason University as police officers in the campus police department. They

have issues and violations of law and contract in common, and their complaints involve factually similar events to Plaintiff. The duties of Plaintiff and other police officers similarly situated are to police and patrol the three (3) campuses of and for George Mason University. Attached hereto as exhibit 1 is a list of those similarly situated police officers who consent to this action.

2. Defendant Rector and Visitors of George Mason University is a corporate body established by Virginia statute, Title 23, Chapter 9.1, Sections 23-91.24 *et seq.* of the Code of Virginia (1950), as amended, and is an agency of Defendant Commonwealth of Virginia. Defendants are hereinafter referred to as "GMU." The head of GMU is Alan Merten, its President. GMU controls and expends the funds of George Mason University, directs the affairs of George Mason University, makes all needful rules and regulations concerning George Mason University, appoints the president, all professors, teachers, staff members, agents, and employees and fixes their salaries and terms and conditions of employment. GMU established its campus police department pursuant to Title 23, Chapter 17, Sections 23-232 *et seq.* of the Code of Virginia (1950), as amended.

3. Pursuant to its authority to provide for the conditions and terms of employment and compensation for those employed by the campus police department, GMU contracted for the employment of Plaintiff and other police officers similarly situated. The material terms to that contract are that Plaintiff and other police officers similarly situated would be compensated at an hourly rate for all hours worked during a work period that do not exceed a base number of hours, either forty (40) hours

per one (1) week work period or eighty (80) hours per two week work period. Plaintiff and other police officers similarly situated would be compensated for overtime compensation, payment at the [sic] one and one half times the hourly rate, for any time worked in excess of the base number of hours during a work period. Plaintiff and other police officers similarly situated would be paid twice a month.

4. Since Plaintiff and other police officers similarly situated have been employed by GMU and despite the employment contract with GMU, GMU knowingly did not to [sic] compensate Plaintiff and other police officers similarly situated for all worked [sic] performed at the request, knowledge and/or benefit to GMU. GMU stated both orally and in writing its policy was not to compensate Plaintiff and other police officers similarly situated for all time worked prior to the beginning or [sic] any work day or shift, nor to compensate Plaintiff and other police officers similarly situated for all time worked after the work day or shift ended or for work performed outside the normal day or shift.

5. Included in the time worked but knowingly, willfully and intentionally not compensated by GMU was roll call of fifteen (15) minutes prior to the beginning of each shift (day of work). "Roll call" is, *inter alia*, when sergeants informed his or her squad concerning updates, criminal activities, activities or events at GMU, internal policies and procedures, and patrol issues. Such activity is an integral part of GMU's activities, occurred during a substantial portion of Plaintiff's activities, was required by GMU, was on the GMU's premises, but GMU required this work not to be reported as on duty time. GMU's

failure to compensate Plaintiff and other police officers similarly situated has been continuous since Plaintiff and other police officers similarly situated began their employment with GMU. The beginning dates of employment are shown on Exhibit 1. Plaintiff and other police officers similarly situated understood from GMU's statement that they were not to report any of this time worked.

6. Included in the time worked and knowingly, willfully and intentionally not compensated by GMU is when GMU knew and/or required Plaintiff and other police officers similarly situated to work at home. Such work approximated two-tenths (0.2) of an hour once a week for police officers, and twice a week for higher ranking officers. Such work involved scheduling changes in shifts, discussing cases with superiors, attorneys for accused persons, and Commonwealth Attorneys, and investigating cases when witnesses were available. Such work is substantial and significant and involves activity which is an integral part of GMU's activities, occurred during a substantial portion of Plaintiff's activities, was required by GMU, but was required not to be reported as on duty time or if it was reported it was reduced by GMU. GMU's failure to compensate Plaintiff and other police officers similarly situated for this work has been continuous since Plaintiff and other police officers similarly situated began their employment with GMU. Plaintiff and other police officers similarly situated understood from GMU's statement that they were not to report any of this time worked.

7. Included in the time but knowingly, willfully and intentionally not compensated by GMU is when

GMU knew and/or required Plaintiff and other police officers similarly situated to work on average of fifteen (15) minutes before roll call. Such work involved normal police duties such as checking equipment and weapons such as radios, battery, weapons and ammunition for operational capability and safety concerns, providing maintenance for weapons and uniforms, checking electronic, voice, inter-office and regular mail for discussion at roll call, and completing paperwork, notes, other department forms or time sheets prior to the beginning of roll call. Such work is substantial and significant and involves activity which is an integral part of GMU's activities, occurred during a substantial portion of Plaintiff's activities, was required by GMU, was on the GMU's premises, but was required not to be reported as on duty time. GMU's failure to compensate Plaintiff and other police officers similarly situated has been continuous since Plaintiff and other police officers similarly situated began their employment with GMU. Plaintiff and other police officers similarly situated understood from GMU's statement that they were not to report any of this time worked.

8. Included in the time but knowingly, willfully and intentionally not compensated by GMU is when GMU knew and/or required Plaintiff and other police officers similarly situated to work an additional one and one half hours (1.5) per week while attending the police academy. Such activity included traveling from the academy to the main campus to review general orders under a supervisor's direction and to have work assignment reviewed by supervisors. Such work is substantial and significant, involves normal police activity, is an integral

part of GMU's activities, occurred during a substantial portion of Plaintiff's activities, was required by GMU, was done on and off GMU's premises, but was required not to be reported as on duty time. GMU's failure to compensate Plaintiff and other police officers similarly situated has been continuous since Plaintiff and other police officers similarly situated began their employment with GMU. Plaintiff and other police officers similarly situated understood from GMU's statement that they were not to report any of this time worked.

9. Included in the time but knowingly, willfully and intentionally not compensated by GMU is when GMU knew and/or required Plaintiff and other police officers similarly situated to work on average of fifteen (15) minutes after the conclusion of a shift (day of work). Such work is substantial and significant and involves normal police duties such as checking equipment and weapons such as radios, batteries, weapons and ammunition for operational capability, providing maintenance for weapons and uniforms, checking electronic, voice, inter-office and regular mail for discussion at roll call, and completing paperwork, notes, other department forms or time sheets after the conclusion of a shift. Additionally, such work was required to ensure a proper transition from shift to shift and brief command on events of the shift. Such activity is an integral part of GMU's activities, occurred during a substantial portion of Plaintiff's activities, was required by GMU, was on the GMU's premises, but was required not to be reported as on duty time. GMU's failure to compensate Plaintiff and other police officers similarly situated has been continuous since Plaintiff and other police officers similarly situated began

their employment with GMU. Plaintiff and other police officers similarly situated understood from GMU's statement that they were not to report any of this time worked.

10. GMU knowingly failed to pay Plaintiff and other police officers similarly situated for milage [sic] incurred on tasks or work performed at the request or benefit to the GMU. Such milage [sic] was incurred by Plaintiff and other police officers similarly situated when the GMU ordered them to another campus when they were at home (telephonically) or between shifts, or at roll call. Plaintiff and other police officers similarly situated were required first to report to the main or Fairfax Campus, then to the other campuses, pick up equipment and weapons, and travel in their own vehicles to the other campuses. This was incurred at the request, convenience of and for the interest of the GMU.

11. Since and during periods when Plaintiff and other police officers similarly situated began their employment with GMU and despite the employment contract with GMU, GMU knowingly did not to [sic] compensate Plaintiff and other police officers similarly situated for lunch periods in which Plaintiff and other police officers similarly situated were required to be ready or on-call to work.

12. In addition to the terms of the employment contract, GMU is required to comply with all state and federal wage and hour laws and regulations. The GMU knowingly did not comply with those state and federal wage and hour laws by failing to compensate Plaintiff and other police officers similarly situated for all work

performed for GMU, nor compensate Plaintiff and other police officers similarly situated at the correct rate of pay.

13. GMU willfully and intentionally did not fully compensate Plaintiff and other police officers similarly situated because it was using the money for its benefit and for other than wages. Further, GMU without any good faith basis, denied claims of compensation despite Plaintiff's assertion of his rights. The failure to compensate Plaintiff and other police officers similarly situated in accordance with the terms of his employment contract was knowing and willful.

14. GMU was given a reasonable opportunity to investigate and rectify Plaintiff's wage and hour claims. Thereafter, GMU attempted to make it appear it had complied with the terms of the contract and/or state and federal laws and regulations. This was after Plaintiff and other police officers similarly situated initiated a complaint with the university's equity office and the Department of Labor. Even then, GMU failed to pay what was owed, e.g. statutory liquidated damages and overtime for a third year.

15. The first attempt was in March 1998, when GMU unilaterally sent them money and a letter. The letter stated in a manner intended to mislead that this was the amount GMU owed after the university concluded its review. It falsely stated the error was unintentional and the letter was designed to mislead the officers into abandoning their right to statutory liquidated damages and a third year of overtime, because of a willful violation of the wage and hour law.

16. The second attempt was in January 1999, after an attorney was employed by the workers. By making an additional payment, GMU has admitted that its March statements were false and willful. Even then, however, the January 1999 payment failed to pay statutory liquidated damages and reasonable attorney's fees.

17. Because the GMU would not provide Plaintiff and other police officers similarly situated complete information concerning his time and attendance until December 1998, Plaintiff and other police officers similarly situated are not fully aware of the nature and extent of their claims. To this date Plaintiff and other police officers similarly situated can provide a reasonable approximation of compensation due. Only by discovery can the extent of Plaintiff and other police officers similarly situated damages be precisely ascertained.

18. GMU continues to violate the terms and conditions of Plaintiff and other police officers similarly situated employment contract with GMU, the terms and conditions of Plaintiff and other police officers similarly situated and GMU's agreement concerning working for outside entities or organizations, and state and federal laws and regulations.

19. In addition to the above wage issues, GMU facilitated and otherwise affected the separate and independent employment of Plaintiff and other police officers similarly situated. GMU told or otherwise informed Plaintiff and other police officers similarly situated that the hourly rate of pay for this separate and independent employment was $25.00 per hour. GMU advertised this

separate and independent employment, took no administrative fee, took on the responsibility of proper recording of the amount of hours worked by Plaintiff and other police officers similarly situated, billed those separate and independent employers for this work, collected compensation due Plaintiff and other police officers similarly situated, and deducted any federal taxes or other deductions for Plaintiff and other police officers similarly situated, and disbursed money to Plaintiff and other police officers similarly situated. The work for separate and independent employers was not part of GMU's employment of Plaintiff and other police officers similarly situated. GMU paid Plaintiff and other police officers similarly situated less than the hourly rate of $25.00 per hour.

20. Plaintiff Craig Scott Dougall, on or about September and October, 1997, complained through his superiors and to the University's Equity Office, Margaret Howell, the authorized agent of the University charged with the responsibility to administer the University's personnel policies, about the University's failure to pay him wages he thought he was entitled to at that time and other issues related to safety, unequal application of general orders, promotions and lack of equipment. He discussed that he was not the only one who thought wages were due him and Dougall told her that the other officers and dispatchers had these same issues. After more than three months, Ms. Howell informed Plaintiff that wage issues must be handled through human resources. As to the other issues, Ms. Howell told Plaintiff to see Ellen Drewett, the University's authorized agent charged with the responsibility to advise employees as to determine

what was greivable, meaning whether his wage claims were greivable under the Virginia Personnel Act, Title 2.1 Chapter 10, § 2.1-110 *et seq.* of the Code of Virginia (1950), as amended, and/or The Department of Employee Relations Counselors, Title 2.1 Chapter 10.01 § 2.1-116.01 *et seq.* of the Code of Virginia (1950), as amended.

21. Ellen Drewett is the University's Employee Relations Manager authorized to determine issues under the Virginia Personnel Act, Title 2.1, Chapter 10, § 2.1-110 *et seq.* of the Code of Virginia (1950), as amended, and/or The Department of Employee Relations Counselors, Title 2.1, Chapter 10.01 § 2.1-116.01 *et seq.* of the Code of Virginia (1950), as amended. On or about January 21, 1998, Ms. Drewett met Plaintiff Dougall, who told her he was informing the other officers about these meetings and what advice he was given. He discussed the wages issues and other issues including issues related to safety, unequal application of general orders, promotions and lack of equipment. Ms. Drewett advised Plaintiff Dougall that wage issues were not greivable, meaning his claims were not greivable under the Virginia Personnel Act, Title 2.1, Chapter 10, § 2.1-110 *et seq.* of the Code of Virginia (1950) as amended, and/or The Department of Employee Relations Counselors, Title 2.1, Chapter 10.01, § 2.1-116.01 *et seq.* of the Code of Virginia (1950), as amended. She informed him no issues he raised were greivable because he and the other officers had not applied for promotion and the wage issues must be resolved by Human Resources. Ms. Drewett, upon Dougall saying to her that he would complain to the Department of Labor since pay is not greivable, replied that "you would lose your job if

you were to sue or bring legal action against a big corporation or firm."

22. As a result of being told that the matter was not greivable, Plaintiff Craig Scott Dougall and officer Karl Rodriguez sought and obtained legal advice concerning their rights. That counsel, made a written claim by letter to the head of GMU, Alan Merten, President of the University, on or about May 28, 1998. Attached Exhibit 2. That claim letter claimed compensation was due Plaintiff and other officers similarly situated for the violations of the Fair Labor Standards Act based on the University's failure to pay Plaintiff and the other officers similarly situated the rate agreed to between the University and Plaintiff and the other officers similarly situated. Plaintiff's counsel was contacted by the University's Vice President for Legal Affairs, who indicated he would be responsible for determining Plaintiff's claims. The University, by its authorized agents, paid some of the claimed compensation but through its authorized agents it denied the remaining claims of compensation. After denial of all claims for compensation by the University, Plaintiff and other officers filed suit in this Circuit Court.

Count I: Breach of Employment Contract

23. Plaintiff incorporates by reference Paragraphs 1 through 22, inclusively, as if fully set forth herein.

24. GMU breached the employment contract by not performing the material terms of the contract. GMU breached the contract by failing to fully compensate and/or under compensating Plaintiff for work performed for

GMU. The compensation due is wages and reimbursement for costs expended on GMU's behalf.

25. As a direct result of GMU's breach, Plaintiff was and continues to be damaged.

26. Plaintiff's and the other police officers' damages are wages and compensation from his employer under an agreement to pay him wages. Payment was to be made by legal tender of the United States.

WHEREFORE Plaintiff prays this Court to declare the terms of the relationship between Plaintiff and GMU, and for damages in excess of $15,000.00, costs, and reasonable attorney's fees.

Count II: Breach of Contract

27. Plaintiff incorporates by reference Paragraphs 1 through 29, inclusively, as if fully set forth herein.

28. GMU breach [sic] the separate contact [sic] with Plaintiff by not performing the material terms of the contract. GMU breached the separate contract by failing to compensate Plaintiff at the agreed upon rate for all hours Plaintiff worked.

29. As a direct result of GMU's breach, Plaintiff was and continues to be damaged.

WHEREFORE, Plaintiff prays this Court to declare the terms of the relationship between Plaintiff and GMU, and for damages in excess of $15,000.00 and costs.

Count III: Violation of Fair Labor Standards Act
[deleted per order of 8/26/99]

Count IV: Discrimination [deleted per order of 8/26/99]

Respectfully submitted,
CRAIG SCOTT DOUGALL
By counsel:

McGEEHAN & ASSOCIATES
10615 Judicial Drive, Suite 403
Fairfax, VA 22030
(703) 273-5303
(703) 273-5307 (facsimile)

/s/ John P. McGeehan
John P. McGeehan,
Esq., VSB No. 9160

/s/ George A. Hawkins
George A. Hawkins,
Esq., VSB No. 40125

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent to Sydney E. Rab. Assistant Attorney General, Office of the Attorney General, 900 E. Main Street, Richmond, VA 23219, by overnight mail on the 16th day of September, 1999.

/s/ John P. McGeehan
John P. McGeehan

Plaintiff's Exhibit 1

List of Plaintiffs

Kevin Barrett	1/6/86 to present
Robert Brownell	12/2/90 to present
Matthew Brudvig	1/1/88 to present
David Clark	3/13/89 to present
Heather Connally	5/1/95 to present
Jimmy Davis	2/29/96 to present
Craig Dougall	8/28/95 to present
Thomas Green	8/5/96 to present
Jeffrey Green	4/1987 to present
Bruce Jackson	7/1/89 to present
Gilbert McAuliff	8/19/95 to present
Anthony Lamanna	8/14/97 to present
Judy Meade	4/15/92 to present
Willie Morton	1/1/87 to present
Brian Neeley	1/6/96 to present
Steven Picklesimer	8/5/96 to present
Joseph Pignatiello	2/1986 to present
Blanche Skar Cathcart	5/1/87 to present
Dennis Stewart	11/1986 to present
Stuart Strange	9/1/93 to present
James Van Doren	8/21/95 to present

Plaintiff's Exhibit 2

JOHN P. MCGEEHAN & ASSOCIATES, P.C.
Attorneys at law
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P.O. Box 1425
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Fax (703) 273-5307 (703) 273-5303 1-800-224-5303

May 28, 1998

Alan G. Merten
President
George Mason University
4400 University Drive
Fairfax, VA 22030-4444

RE: *Fair Labor Standards Act violations*

Dear President Merten:

Thirty (30) employees of the George Mason University Police/Department of Public Safety whose names are on the attached list hired me to assist them in recovering legal damages and attorneys' fees due for violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, as amended in 1985, U.S. Department of Labor regulations contained in 29 C.F.R., in particular Part 553 and FLSA case law, including *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) and its progeny. It is of utmost importance in this matter that **you emphasize with all University officers and employees that there will be no retaliation against these employees for asserting claims.**

My review has found that since last year GMU police officers complained to their supervisors about overtime pay and in January one or more of them filed a complaint with the U.S. Department of Labor (DOL). DOL accepted the complaints for investigation, but, due to its backlog of complaints, the investigation has not proceeded far. I will represent the police officers regarding the administrative complaint, working with the Department of Labor and representing them in court if necessary. The officers demand that they be paid all overtime pay they are due, the 100% liquidated damages provided in 29 U.S.C. § 216(b) and reasonable attorney's fees and costs as allowed by 29 U.S.C. § 216. I was told that in January 1998, George Mason University unilaterally agreed to pay overtime for pre-shift (roll call) time and did so on March 16. Two officers rejected the checks because they were fearful it could [sic] construed as a settlement. FLSA defines binding settlement and the payments are not binding settlements as defined by FLSA.

The overtime claims for work periods determined by FLSA § 7(k) and 29 C.F.R. § 553.230 pertain to the University's failure to calculate into work shifts "off the clock" work, including, but not limited to the fifteen minute pre-shift for the one year before the period the University has paid (i.e. a third year); preparation time for other than the roll call; meal periods during 8½ hour (Prince William and Arlington) shifts or 12 hour (Fairfax) shifts (which were ordered by Mr. Oglesby's memo on 8/7/97); the fifteen minutes post-shift time (per order of 7/13/96); travel time between the Fairfax and Arlington or Prince William campuses or the Northern Virginia Criminal Justice Academy; post-shift work maintaining equipment,

completing paperwork, receiving telephone calls from supervisors and investigators; some training time; and the time not paid when there was a school closings. [sic] My clients' position is that the University's conduct was willful or reckless within the law's meaning, in particular the acts of Acting Director/Chief John D. Jenkins, Associate Vice-President of Operational Service, Stanley Taylor, Assistant Vice-President-Human Resources, Keith Bushey, and Linda Westphal, Director, Human Resources. For that reason, their claims revert back three (3) years – not two. The University's letter informing the employees of a right to pre-shift payment was misleading in failing to tell the employees there also was a three year period for which they could be paid.

The liquidated damages is for the compensation paid in March and all unpaid overtime pay. Statements made by Interim Director John D. Jenkins and statements made to police supervisors will establish there were no reasonable grounds for believing these were not violations. In fact, the University's labor-management courses cover FLSA. Finally, some supervisors indicated the department simply tried to get away with it as long as it could.

The most serious accusation is intimidation and retaliation. For example, Officer Dougall was removed as a Field Training Officer, a career enhancing position, following the DOL complaint. Officer Dougal [sic] also was required to appear for a questioning by Interim Director Jenkins, which violates the spirit and, perhaps, the terms of the Law-Enforcement Officers' Procedural Guarantees, Virginia Code § 2.1-116.1 *et seq.*. The most symbolically petty retaliation is that officers now must punch a time clock and complete time sheets because of the complaint.

Please ask the appropriate University official or Assistant Attorney General who handles the University's employment issues to contact me to discuss resolving these matters subject to DOL review. I was told there is a meeting on this complaint in early June, so I ask for a reply before that meeting or within seven (7) days, whichever is sooner.

Sincerely yours,

/s/ John P. McGeehan
John P. McGeehan

JPMc/dg
Enclosure: List

cc: All clients
Mr. Koran, U.S. Department of Labor

C:\clients\GMUFLSA\Notification letter to Merton.wpd